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BEFORE THE

Federal Communications Commission

In the Matter of)

Review of the Commission's)

Broadcast and Cable)

Equal Employment Opportunity)

Rules and Policies)

MM Docket No. 98-204

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To: The Commission

APR 15 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE LOCAL TELEVISION GROUP

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Dated: April 15, 2002

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EXECUTIVE SUMMARY

The Local Television Group (“LTVG”) consists of commercial television broadcast stations owned by comparatively small, often family-owned businesses. LTVG members are committed to promoting localism and diversity in broadcast television service. LTVG opposes the FCC’s proposal to adopt new EEO “outreach” regulations.

The proposed “outreach” regulations appear to be arbitrary, capricious and unlawful because (1) the FCC has provided no adequate, rational and coherent explanation of the purpose of the proposed rules; (2) the FCC has provided no adequate, rational and coherent explanation of the substantive requirements of the proposed rules; (3) the proposed rules appear to be premised on the assumption that the broadcast workforce is “homogenous,” but it is not; (4) the proposed rules appear to be premised on the assumption that broadcasters employ an “insular recruitment and hiring process,” but they do not; (5) the proposed rules appear to be premised on the idea that “fairness” is not possible without the proposed rules, but that is not the case; and (6) the specific requirements of the proposed rules all appear to be arbitrary and capricious.

In addition, the proposed rules (7) appear to be beyond the FCC’s statutory authority under the Communications Act; (8) appear to impose requirements that are unconstitutional under the First Amendment; (9) appear to impose requirements that are unconstitutional under the Fifth Amendment; and (10) appear to impose requirements that entail an unconstitutional delegation of the FCC’s lawmaking powers.

In addition, there is no sound policy reason to adopt any of the proposed rules.

The proposed “outreach” rules thus appear to be arbitrary, unlawful, beyond the FCC’s statutory authority and unconstitutional. FCC therefore should not adopt any of the proposed “outreach” rules.

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COMMENTS OF THE LOCAL TELEVISION GROUP

The Local Television Group ("LTVG"), by counsel, submits the following comments in response to the *Second Notice of Proposed Rule Making*¹ in this proceeding.

I. STATEMENT OF INTEREST

LTVG is a recently-formed group of commercial television broadcast stations committed to promoting diverse local service and ownership in broadcast television.² LTVG stations are located in markets ranging from New York City (DMA Rank 1) to San Angelo, Texas (DMA Rank 196). They include both affiliates of the major broadcast television networks and independent stations. All have one thing in common, however: They are owned not by major media conglomerates and Fortune 500 companies, but by comparatively small – often family-owned – businesses.

LTVG believes that preserving diverse local broadcast ownership and service are priorities that remain central to any sound broadcast regulatory theory. It believes the

¹ FCC 01-363, 16 F.C.C. Rcd. 22843 (rel. Dec. 21, 2001) ("*Second Notice*").

² A list of LTVG member stations is contained in Attachment 1.

importance of diverse local broadcast service will not diminish so long as people are affected by, and seek to affect, their local communities. It believes that diversity in broadcast ownership will remain important so long as broadcasting is valued not simply in dollars but by the character of its service content.

To promote these values, LTVG intends to participate in FCC proceedings likely to affect the preservation and enhancement of diverse local broadcast service. The instant docket is such a proceeding, because in it the FCC proposes to adopt detailed new EEO regulations that would impose substantial costs and burdens on LTVG member stations. LTVG member stations are not opposed *per se* to bearing additional regulatory burdens and costs, but they do oppose regulations that would impose new costs and burdens without a demonstrably adequate regulatory purpose. These comments will explain why LTVG believes the FCC's proposed "outreach" regulations have no adequate regulatory purpose and appear to be arbitrary and unlawful for other reasons as well.³

³ LTVG does not oppose the FCC's proposal to continue its prohibition of discrimination in broadcast employment. Such discrimination is already prohibited by existing employment discrimination laws, and LTVG thinks the FCC is authorized by the Communications Act to consider violations of existing employment discrimination laws in making its broadcast licensing decisions. These comments therefore focus only on the FCC's proposed "outreach" regulations.

Because LTVG's members are broadcast television stations, these comments also focus solely on application of the proposed "outreach" rules to broadcasters. Most of what is said here could equally be said, however, regarding application of the proposed "outreach" rules to cable television providers and other MVPDs.

II. THE PROPOSED “OUTREACH” REGULATIONS APPEAR TO BE ARBITRARY AND CAPRICIOUS

A. The Proposed “Outreach” Rules Have No Adequate Statement of Regulatory Purpose

As with any type of proposed new law, the most important thing that can be said in support of a proposed new FCC regulation is *its purpose* – the *reason why* it is asserted that the proposed new regulation should govern human conduct by force of law. An FCC regulation with no adequate stated purpose is not simply a rule without a reason – it is an arbitrary and hence unlawful exercise of federal regulatory power. LTVG has reviewed the *Second Notice* with care but has found no adequate statement of the purpose of the proposed new “outreach” rules.

The purpose which the FCC says the “outreach” rules will serve is stated in paragraphs 5 and 15 of the *Second Notice*. Given the importance of the agency’s statement of the rules’ purpose, paragraphs 5 and 15 of the *Second Notice* are worth quoting at length. In paragraph 5, the FCC revisits the expressed purpose of its former “outreach” rules, the rules set aside in *MD/DC/DE Broadcasters Association v. FCC*.⁴ The FCC states:

The [former] rules . . . required more “than merely refraining from discrimination.” They also required broadcasters, cable systems and other MVPDs “to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities [because] . . . repeated hiring without broad outreach may unfairly exclude minority and women job candidates . . .” The Commission concluded that nondiscrimination in hiring was not enough. “Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.”⁵

⁴ 236 F.3d 13, *reh’g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom., Minority Media Telecomms. Council v. MD/DC/DE Broadcasters Ass’n*, 122 S. Ct. 920 (2002), and *Office of Commun., Inc. v. MD/DC/DE Broadcasters Ass’n*, 122 S. Ct. 920 (2002) (hereafter “*Association*”).

⁵ *Second Notice*, 16 F.C.C. Rcd. at 22844 (¶5), *quoting Report and Order* in Docket No. 98-204, 15 F.C.C. Rcd. 2329, 2331 (2000) (¶3) (hereafter “*R&O*”).

In paragraph 15, the FCC essentially adopts its earlier statement of the purpose of its former rules as applicable also to the proposed new “outreach” rules. The FCC states:

It is important that the Commission have EEO rules that prohibit discrimination in broadcast and cable employment and also require broadcasters and cable entities to reach out to all segments of the community in filling vacancies. To this end, the Commission proposes EEO rules that deter discrimination and achieve broad outreach in broadcast and cable practices. As we indicated in the Report and Order, and noted above, “outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.” Broad outreach in recruitment practices will ensure fairness to all potential applicants, including all races and both genders, without infringing on the rights of any group.⁶

To summarize, the FCC states that the purpose of the proposed “outreach” rules is “to ensure fairness to all potential applicants” and “to deter discrimination” by preventing “a homogenous workforce” from “simply replicating itself” by “insular recruitment and hiring” from “business and social contacts.”

Apart from the general “fairness” objective, which is discussed later, the FCC’s effort to justify its proposed “outreach” rules thus rests squarely on two factual premises. The major premise is that the broadcast workforce is “homogenous.” The minor premise is that broadcasters employ an “insular recruitment and hiring process.” If either premise is false, the FCC’s stated purpose for the “outreach” rules disintegrates. If the broadcast workforce is not “homogenous,” there is obviously no need to prevent its nonexistent “homogeny” from “replicating.” And if broadcasters do not follow an “insular recruitment and hiring process” confined to their “business and social contacts,” nothing could be “replicated” by such a process.

⁶ *Id.* at 22847 (¶15) (footnote omitted).

Despite the counterintuitive nature of both of the FCC's premises, the FCC has supplied no evidence that either premise is true. In fact, both appear to be false.

1. The Broadcast Workforce Is Not "Homogenous"

Published EEOC data reflects that the broadcast (radio and television) workforce included, in the year 2000, 41.5% females and 22.5% minorities. In the so-called "upper-four" job categories, EEOC data reflects that the broadcast workforce included 35.8% females and 20.2% minorities in the year 2000.⁷ This data does not indicate the existence of a "homogenous" broadcast workforce. It indicates the opposite. A "homogenous" workforce, according to the dictionary, is one comprised of persons "having similarity in structure because of common descent."⁸ As concerns racial, ethnic and gender attributes, therefore, the available EEOC data appears to disprove the FCC's major premise that the broadcast workforce is "homogenous."

Several responses to the EEOC data might be made in support of the FCC's major premise. None appears to have merit, however. One is that EEOC broadcast workforce data is somewhat less comprehensive than that formerly published by the FCC.⁹ It might therefore be

⁷ This data is derived from a table found at "www.eeoc.gov/stats/jobpat/2000/sic3/483.html" (reproduced in Attachment 2). The same table also contains year 2000 EEOC broadcast workforce data for four specific minority groups – Blacks, Hispanics, Asian Americans and American Indians. That data indicates that the broadcast workforce also is not "homogenous" with respect to these four minority groups.

⁸ WEBSTER'S NEW WORLD DICTIONARY 672 (2nd col. ed. 1986). It appears possible that the FCC did not mean to use the word "homogenous" (noun form "homogeny") but rather intended to use the word "homogeneous" (noun form "homogeneity"). "Homogeneous" means "the same in structure, quality . . . similar or identical . . . composed of similar or identical elements or parts; uniform." *Id.*; accord, e.g., I OXFORD ENGLISH DICTIONARY 1324 (Compact ed. 1971) ("homogeneous" means "of the same kind, nature or character"; "homogenous" means "structures which are genetically related, in so far as they have a single representative in a common ancestor").

⁹ EEOC data reflects the workforce of employers required to file EEO-1 forms with the EEOC, which is to say employers with 100 or more employees.

argued that the EEOC data is not conclusive on the question of “homogeny.” But according to the most recent FCC data of which LTVG is aware, the 1997 broadcast workforce included 41.0% females and 20.2% minorities.¹⁰ According to the same FCC data, the so-called “upper-four” job categories in the 1997 broadcast workforce included 34.9% females and 18.2% minorities.¹¹ These FCC figures, too, belie the FCC’s major premise that the broadcast workforce is “homogenous.”

It might also be argued that year 2000 EEOC data and year 1997 FCC data (which are the most recent sets of relevant data of which LTVG is aware) are now “out-of-date.” LTVG is aware of nothing, however, that would indicate that the broadcast workforce suddenly became “homogenous” at some point in time after 1997 or 2000. In fact, the available data seems to belie any such notion.¹² In addition, it seems unlikely that a precipitous decline in female and minority broadcast employment (a decline to *near zero* would be needed to produce a literally “homogenous” broadcast workforce) would have gone unheralded and unnoticed.

It is also possible (although it seems unlikely) that the FCC is referring in the *Second Notice* to some type of “homogeny” other than that of gender, ethnicity or race. Strikingly, the

¹⁰ See Public Notice No. 84031, *1997 Broadcast and Cable Employment Report*, 1998 FCC LEXIS 3082 (rel. June 23, 1998) (copied in Attachment 3).

¹¹ *Id.*

¹² According to the FCC and EEOC data, female and minority employment in broadcasting has not been declining but rather *rending up* since at least 1993. According to the FCC’s data, the broadcast workforce included 39.6% females in 1993, 39.9% females in 1994, 40.7% females in 1995, 40.8% females in 1996, and 41.0% females in 1997. *Id.* According to the EEOC’s data, the figure had risen to 41.5% by the year 2000. See note 7, *supra*, and Attachment 2. Similarly, the FCC’s data indicates that the broadcast workforce included 18.2% minorities in 1993, 18.4% minorities in 1994, 19.7% minorities in 1995, 19.9% minorities in 1996, and 20.2% minorities in 1997. See note 10, *supra*, and Attachment 3. The EEOC’s data indicates that the percentage of minorities in the broadcast workforce had risen to 22.5% by the year 2000. See note 7, *supra*, and Attachment 2.

FCC has not clearly stated in the *Second Notice* exactly *what* type of “homogeny” the proposed “outreach” rules are intended to prevent from “replicating.” The FCC does state in the *Second Notice* that it no longer proposes to require the use of recruitment sources specifically targeted at minorities and women, and it also states that the data it proposes to continue to collect regarding female and minority employment will not be relevant to compliance with the proposed “outreach” requirements.¹³ On the other hand, the FCC also indicates in the *Second Notice* that it is concerned that recruitment practices be “fair” with respect, in particular, to applicant gender and race.¹⁴ In addition, the FCC’s basic rule prohibiting employment discrimination focuses only on discrimination based on “race, color, religion, national origin, or sex.”¹⁵ It seems improbable that the FCC intends its proposed “outreach” rules to prevent the “replication” of some type of workforce “homogeny” involving a class not protected under the FCC’s basic rule against employment discrimination.

Moreover, even assuming that this improbability is the case, it is obviously incumbent on the FCC to explain with clarity what it thus far has failed to explain at all: *what* type of “homogeny” the proposed rules seek to prevent from “replicating”; *why* the FCC believes such “homogeny” exists; and *where* in the Communications Act the FCC finds the statutory authority to attempt by force of law to prevent the “replication” of such “homogeny.” Indeed, the very

¹³ 16 F.C.C. Rcd. at 22850 & 22857-58 (¶¶ 23, 47 & 50-52).

¹⁴ In explaining the purpose of the “outreach” rules, the FCC states: “[R]epeated hiring without broad outreach *may unfairly exclude minority and women job candidates.*” *Id.* at 22844 (¶5), quoting *R&O*, 15 F.C.C. Rcd. at 2331 (¶3) (emphasis supplied). The FCC further states: “Broad outreach in recruitment practices will ensure fairness to all potential applicants, *including all races and both genders.*” *Id.* at 22847 (¶15). Two of the FCC’s thirteen so-called “Prong 3 Menu Options” also focus specifically on minorities and women. *Id.* at 22852-53 (¶30).

¹⁵ See *id.* at 22849 (¶¶18-19). Discrimination with respect to other worker attributes, such as age, physical or mental disability, sexual-orientation, physical appearance and political affiliation, is not prohibited under the FCC’s anti-discrimination rule. *Id.*

fact that the FCC has not yet explained such basic things about its proposed new “outreach” rules is itself a serious problem. A rule without a coherent explanation is an arbitrary rule. As it stands, one can only say of the proposed “outreach” rules, as the late Alexander Bickel once said of a Supreme Court decision, “One is left to ask why.”¹⁶

The final defense of the FCC’s major premise which occurs to LTVG would be to argue that the concept “homogenous,” like every (or nearly every) other concept, is relative. Under this “relativity theory” of the “homogenous,” a workforce not “homogenous” in a literal sense could “effectively” be so if a sufficiently dramatic disparity exists between that workforce and the overall population from which it was derived, whereas a workforce that is literally “homogenous” could not properly be termed so if it is derived from a similarly “homogenous” overall population.¹⁷ Under this argument, a particular workforce that is not *literally* “homogenous” as to the relevant trait, but which has a much different composition with respect to that trait than the overall workforce from which it was derived, would be deemed “effectively” or “comparatively” “homogenous” as to the relevant trait, due to the disparity in composition as to the relevant trait which exists between the particular workforce and the overall workforce from which it was derived. This argument shows little regard for the meaning of the word “homogenous” (or the word “homogeneous”), but it is not completely irrational.

¹⁶ A. BICKEL, *THE MORALITY OF CONSENT* 28 (1975). Professor Bickel referred to *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷ If, for example, all of the people in Sweden have blond hair, a Swedish workforce composed entirely of blond-haired people would not have a meaningfully “homogenous” hair color, according to this theory. The theory posits that a concept has meaning only with reference to its opposite, and thus the concept of “homogeny” would have no meaning absent the possibility of difference.

Applying this argument to the FCC's major premise, and assuming for present purposes the most likely explanation of what the FCC has not yet explained – that the relevant traits for determining a “homogenous” workforce are gender, ethnicity and race, not less celebrated human characteristics – the FCC's major premise might be supportable, but *only if* the composition of the broadcast workforce and the relevant overall workforce with regard to race, ethnicity or gender is so great as to make the broadcast workforce appear, when compared to the overall workforce, “homogenous” with respect to race, ethnicity or gender. The problem with this defense of the FCC's major premise is that, once again, the available facts do not seem to support it.

According to EEOC data, the overall workforce in the year 2000 contained 47.1% women and 29.2% minorities.¹⁸ Although those percentages are somewhat higher than the EEOC's parallel percentages for the year 2000 broadcast workforce – 41.5% females and 22.5% minorities¹⁹ – the disparity is far from sufficient to support a rational conclusion that the broadcast workforce is effectively, when compared to the overall workforce, a “homogenous” collection of “white males.” In fact, the EEOC data reflects that only 46.9% of the year 2000 broadcast workforce consisted of non-minority males.²⁰ It is difficult to conceive how a workforce in which non-minority males make up less than half of all workers could *ever*

¹⁸ This data is taken from the EEOC table posted at “www.eeoc.gov/stats/jobpat/2000/national.html” (Occupational Employment in Private Industry, All Industries) (copied in Attachment 4).

¹⁹ See note 7, *supra*, and Attachment 2.

²⁰ Id.

rationality be termed “homogenous” (or “homogeneous”) with respect to non-minority male status, no matter *what* the composition of the overall workforce.²¹

The FCC’s major premise thus appears to be false. If the FCC has some evidence to support its major premise that the broadcast workforce is “homogenous,” it should make that evidence known. Absent such evidence, the stated reason for the FCC’s proposed “outreach” rules is plainly unsound, because a “homogeny” that does not exist can present no danger, in logic or in fact, of “replicating itself.”

The FCC is also free, of course, to abandon its major premise and attempt to construct an entirely different rationale for adopting the proposed “outreach” rules. One way to attempt this would be to maintain that the FCC did not really mean “homogenous” (or “homogeneous”) in the *Second Notice* (and also in the earlier *R&O*), but rather meant “insufficiently diverse.” This path would not lead out of the woods, however. The FCC would still be required to explain *what* about the current broadcast workforce is “insufficiently diverse,” *why* the FCC thinks the degree of workforce “diversity” is “insufficient,” *how* the FCC’s proposed “outreach” rules would remedy the perceived problem, and *where* in the Communications Act the FCC is empowered (consistent with the Constitution) to render such judgments and to regulate such matters by federal law. If the FCC were to say what seems most likely – that the proposed “outreach” rules are intended to prevent “replication” of a workforce that is “insufficiently diverse” with respect to gender and minority status – it would effectively admit that the proposed “outreach” rules are simply its latest effort to require by law the same type of race and gender-based employment

²¹ No different conclusion could be reached based on the available FCC data. That data indicates that in 1997 the national labor force included 46.2% women and 26.0% minorities, and the broadcast workforce included 41.0% women, 20.2% minorities and 48.5% non-minority males. See note 10, *supra*, and Attachment 3.

preferences which the courts have already twice declared to be unconstitutional.²² If the FCC were to maintain, on the other hand, that the “outreach” rules are a race and gender-neutral effort to remedy some other type of “insufficient diversity” in the broadcast workforce, the FCC would be required to explain not only what that “insufficiency” is, but why it has statutory authority to regulate broadcast employment practices with regard to it. The FCC would be hard pressed to demonstrate that it possess such authority, because it almost certainly does not. The FCC has no apparent authority under the Communications Act (including but not limited to Sections 309(j) and 334 of the Act) to engage in the wide-ranging, generic regulation of broadcast employment practices.

In addition, there appears to be no rational support for the assumption that a workforce that is not “homogenous,” but rather contains substantial numbers of females and minorities (as well as all other classes of persons on which the FCC might conceivably seek to focus), would be likely to “replicate” its current level of (allegedly) “insufficient diversity,” no matter *what* type of recruitment and hiring process were to be employed.²³ Nor is there any apparent rational explanation for why such hypothetical “replication” would of necessity be a bad thing, much less a thing that the FCC is empowered under the Communications Act (and the Constitution) to try to prevent by compulsion of law.

Given the foregoing, it appears that (1) the broadcast workforce is not “homogenous,” and that the FCC’s major premise supporting the “outreach” rules is therefore false; (2) no

²² *Association*, 236 F.3d at 22; *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356, *reh’g denied*, 154 F.3d 487, *reh’g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (hereafter “*Lutheran Church*”).

²³ This is particularly true given that, over the past nine years, the broadcast workforce has *not* “replicated” with respect to females and minorities, but has rather reflected progressively higher percentages of female and minority employees. See note 12, *supra*.

rational justification exists for the FCC's assumption that the broadcast workforce would be likely to "replicate" its current composition, absent the "outreach" rules; (3) no apparent reason exists to conclude that such hypothetical "replication" would necessarily constitute an "evil," much less one which the FCC is empowered by law to try to prevent; (4) if the "outreach" rules are intended to prevent the "replication" not of "homogeny" but rather an "insufficient diversity" with respect to female and minority employees, the rules are, like the FCC's two former sets of rules, unconstitutional; and (5) if the "outreach" rules are intended to accomplish something else altogether, what that is has not been explained and is also likely to be beyond the FCC's regulatory authority under the Communications Act.

2. Broadcasters Do Not Employ an "Insular Recruitment and Hiring Process"

The FCC's minor premise supporting the proposed "outreach" rules also appears to be invalid. Broadcasters do not, in LTVG's experience, employ an "insular recruitment and hiring process" from among their "circle of business and social contacts." Like any other rational entrepreneurs, broadcasters will employ, unless forced by law to do otherwise, recruitment and hiring practices designed to promptly, efficiently and propitiously fill their employment needs. Which method or methods are used in connection with a given opening will depend on a variety of factors, including but not limited to the nature of the position, the nature of the station, the nature of the market, the nature of existing staff resources and the urgency attached to filling the position. Like any other rational employer, a broadcaster will use those methods most likely to produce the best available employee in the least necessary time and at the lowest possible cost. Although a so-called "insular recruitment and hiring process" from among only a broadcaster's "business and social contacts" might sometimes be a rational means attempting to accomplish these ends, most of the time it will not. It is therefore counterintuitive and irrational simply to

presume that any broadcaster, much less many or all broadcasters, will pursue with frequency the posited “insular recruitment and hiring process.” Yet the FCC’s minor premise assumes that very thing. The FCC has supplied no evidence to support such an unlikely presumption about human behavior. It has supplied, in particular, no evidence whatsoever that broadcasters have ever engaged in the posited “insular recruitment and hiring process” to a material extent. Absent such evidence, the FCC’s minor premise in support of the “outreach” rules is no more valid than its major premise. This is another reason why the proposed “outreach” rules have no adequate stated regulatory purpose.

B. The Provisions of the Proposed “Outreach” Rules Appear to Be Arbitrary

1. The “Prong 1” Requirement of “Outreach” to “All Segments of the Community” Appears to Be Arbitrary

The first of the “outreach” rules’ three so-called “Prongs” would require broadcasters to “widely disseminate information concerning each full-time job vacancy” in a manner that is “reasonably calculated to reach the *entire community*.” *Second Notice*, 16 F.C.C. Rcd. at 22847 & 22850 (¶¶16 & 23) (emphasis supplied). The FCC proposes to define “community” as, “at a minimum, the county where a station is licensed . . . or [the] Metropolitan Statistical Area (“MSA”) if the county is part of an MSA.” *Id.* at 22850 (¶23). The FCC does not offer an explanation of what it means by the word “entire.” It states only that the proposed “Prong 1” rule requires broadcasters to “reach out” in a “broad and inclusive” manner to “all segments of the community” through recruitment sources that “taken as a whole, [are] reasonably calculated to reach the entire community.” *Id.* at 22844-46, 22850 & 22858-59 (¶¶5, 6, 9, 21, 23 & 53). Curiously, the FCC also states, however, that that the proposed rule would *not* require the use of recruitment sources that are “specifically targeted at minorities, women or any other group.” *Id.* at 22850 (¶23).

The proposed "Prong 1" "outreach" requirement appears arbitrary in several respects. To begin with, it purports to require "outreach" to "all segments" (or "all sectors") of the "community," *Second Notice*, 16 F.C.C. Rcd. at 22844 & 22847 (¶¶5 & 15), but the FCC nowhere explains or limits what this vague and expansive language means. A "community" – defined by the FCC as an entire county or MSA – contains many thousands of constituent groups that might be termed "segments" or "sectors." They include not only the physically-defined groups on which past FCC EEO rules have focused (groups defined by race, ethnicity and gender), but myriad other physically-defined groups (age-defined, height-defined, weight-defined, disability-defined, etc.), as well as an almost infinite number of other kinds of groups or "segments," including occupational "segments," ideological "segments," sociological "segments," historical "segments," recreational "segments," political "segments," philosophical "segments," economic "segments" and . . . so on. It would obviously be impossible to "reach out" in a "broad and inclusive" manner to every such "segment" in the "entire community" whenever a job in broadcasting becomes available. It would also be irrational to require broadcasters to do so. *Yet that is exactly the literal purport of the requirement which the FCC has described in the Second Notice.* Absent a clear statement that defines and greatly limits what is meant by a relevant "segment" of the "community," the proposed "Prong 1" requirement is clearly arbitrary (and also beyond the FCC's statutory authority).

The proposed "Prong 1" requirement also appears to require that multiple recruitment sources be used in providing notice of job openings to the "entire community." The *Second Notice* refers to the use of recruitment "sources" in the plural and states that the FCC will evaluate the adequacy of the "number and type" of recruitment sources "taken as a whole." 16 F.C.C. Rcd. at 22849-50 (¶¶20 & 23); *see also id.* at 22847-49 & 22853-54 (¶¶16, 32 & 36). The

FCC does not explain, however, why multiple recruitment sources are required, nor is it otherwise apparent why this should be so. If one is seeking to provide notice of job openings to the “entire community” in a county or an MSA, it would appear that the most sensible way to do so would be to use a means of communication that is *widely available to everyone* in the county or MSA, such as a major newspaper. The thing that the FCC seems to be claiming that its proposed rules are intended to accomplish – “broad,” “inclusive” and “fair” notice of broadcast job openings to every “segment” of the “entire community” – is an objective much the same as that of any standard “legal notice” requirement: making sure that all interested members of the general public have reasonable notice of information that may concern them.²⁴ Such legal notice requirements, including some of the FCC’s own such requirements,²⁵ typically specify that notice must be provided in a *newspaper of general circulation* in the relevant community. Why such a simple newspaper publication requirement would not be a sufficient – and indeed the *most efficient* – means of achieving the FCC’s stated objective is not explained in the *Second Notice*. The fact that “Prong 1” appears to require a much more elaborate and burdensome procedure, one which also seems less well-tailored to achieving the FCC’s ostensible “fair notice” objective, appears to be arbitrary.²⁶

The proposed “Prong 1” also requires that recruitment “outreach” be directed toward reaching “all segments” of the *local* “community” – the county or MSA in which the station is

²⁴ If there is a difference between the “general public” and what the FCC means by the phrase “entire community,” that difference is not apparent from the meaning of the words themselves and has in no manner been explained by the FCC.

²⁵ See, e.g., 47 C.F.R. §§73.3580(c) & 73.3594(a).

²⁶ The FCC might be concerned that newspaper publication would not be “fair” to those who do not read newspapers, but if that is the concern it is not clear why the FCC itself has relied on newspaper publication to achieve notice to the general public. See *id.*

located. As to some positions, such a “local” recruitment focus would be rational, but as to others it would not. When filling available positions requiring previous broadcast experience and expertise (such as most on-air talent and technical, many managerial and some sales positions), it is frequently the case that the entire universe of persons who have (1) the qualifications necessary to fill the position, and (2) a possible interest in taking the position will be located in markets *other than* that of the hiring station. On-air, technical, sales and management personnel frequently advance on the broadcast “career ladder” by moving from smaller markets to larger ones. It would therefore not infrequently be irrational to engage in any form of recruiting in the station’s own local market, because the only persons in that market who are qualified to fill the available position would be unlikely to have an interest in doing so. It also is not infrequently the case, particularly in smaller markets, that a broadcaster will already be familiar with everyone in the market who has the necessary expertise and qualifications to fill a given position, and will thus know, without the need for any type of “recruitment,” whether anyone in the local market might be a viable candidate for the available position. Where such circumstances exist, “local recruitment” is senseless and futile. The FCC’s “Prong 1” requirement fails to recognize or provide for such situations. It appears to be arbitrary for this reason as well.

In addition, following an elaborate local recruitment process is neither rational nor possible in those not infrequent cases in which the available position must be filled more or less immediately, due to sudden employee death, illness, disability or departure; or for other reasons. The FCC’s proposed “outreach” rules provide no meaningful exception for such “urgent hire” situations. Indeed, the FCC states in the *Second Notice* that it “expects” urgent hire situations to be “rare,” and it also warns broadcasters “to proceed without recruitment only in exceptional

circumstances.” 16 F.C.C. Rcd. at 22851 (¶25). Whatever the FCC’s “expectations” may be, urgent hire situations are not rare. They come up frequently and indeed sometimes account for fifty percent or more of all hires, particularly at smaller stations and in smaller markets, where the loss of a single employee can often play havoc with station operations. The FCC’s unrealistic (and unsupported) “expectation,” and its “warning” to broadcasters, would thus effectively compel broadcasters to go through something approaching a “charade” in urgent hire situations, first finding and hiring the needed employee on a “temporary” basis without the required recruitment; then performing the required “recruitment” and assembling the necessary documentary proof; and finally converting the “temporary” employee’s status to that of a “permanent” employee. To require such senseless behavior is irrational. To “expect,” without any factual support for such an “expectation,” that urgent hire situations will be “rare,” when in fact they are not rare, is also irrational.

In addition, the FCC’s statement that it will not require the use of recruitment sources “specifically targeted at minorities [and] women”²⁷ calls into question the very content and purpose of the proposed “outreach” requirement. That requirement purports to entail “broad and inclusive outreach” to “all segments” of the “entire community.” Yet the FCC states that it does *not* propose to require the inclusion of female and minority groups in such “outreach.” This seems strange, particularly given that the FCC’s past broadcast EEO rules, dating all the way back to the FCC’s first EEO rules adopted in 1969, have focused, more or less exclusively, on promoting “outreach” and “fairness” to the *very two groups* that the FCC now says need not specifically be focused on. This apparent anomaly must be explained with clarity before the FCC’s proposed “outreach” rules can be found rational.

²⁷ *Second Notice*, 16 F.C.C. Rcd. at 22850 (¶23).

It seems unlikely the FCC means to say that, in "reaching out" to "all segments" of the "entire community" under the proposed "outreach" rules, broadcasters are not required to make any specific attempt to "reach out" to women and minorities. But if that is not what the FCC means, it is unclear what it *does* mean by its statement that recruitment sources "specifically targeted at minorities [and] women" need not be used. All that occurs to LTVG is that the FCC may mean that a broadcaster is not "required" to use recruitment sources specifically targeted at minorities and women, but *only if* it can demonstrate that it employs some *alternate method* of "reaching out" to minorities and women. What that alternate method might be is not readily apparent, and the *Second Notice* provides no guidance on the point. Unless the FCC better explains precisely *what* it is purporting to require on the very point which has already twice led to judicial determinations that the FCC's past EEO regulations are unconstitutional, the FCC clearly will have failed to provide a reasoned explanation of its proposed new "outreach" rules. A rule not adequately explained is an arbitrary rule.

Finally, the FCC's "Prong 1" requirement also appears to be arbitrary, because the reasoning which the FCC gives to support it is unsound. Separate and apart from the invalidity, as discussed earlier, of the two factual premises which underlie the FCC's effort to justify the proposed "outreach" rules, the FCC also relies on a logical premise in explaining the purpose of the proposed rules. That premise is that, absent the "outreach" rules, the process of filling broadcast employment vacancies would not be "fair" to "everybody."²⁸ The problem with this logical premise concerning the nature of "fairness" is that it is not logical.

²⁸ One would rather say "fair to women and minorities," because that sounds more sensible, but because the FCC has avoided any such statement in the *Second Notice*, all one can accurately say, in describing the FCC's explanation of the proposed rules, is "fair to everybody." See *Second Notice*, 16 F.C.C. Rcd. at 22847 (¶15) (the proposed rules will assure "fairness to all (Continued...)

There is no necessary correlation between a failure to engage in what the FCC terms “broad outreach” and “unfairness” to potential job applicants. To give but one of numerous possible examples, a job in broadcasting could be filled (as many are) simply by placing an advertisement in a trade publication. There is no “broad outreach” in such a procedure, nor is there anything “unfair” in such a procedure. Everyone is free to consult trade publications, and those who do not are not treated “unfairly” if they fail to learn about the jobs that are advertised in such publications. The FCC seems to be maintaining that, in such circumstances, those who do not consult trade publications have no “fair opportunity” to apply for the jobs that are advertised in such publications. Such an expansive conception of “fairness” distorts that important concept beyond all recognition.

The FCC might possibly respond to this point by arguing that a less expansive illustration of its conception of “fairness” must also be considered – the proposition that it would not be “fair” to fill a broadcast vacancy by an “insular” recruitment process that uses no recruitment source that is available to the general public. Ignoring the other problems with such a rhetorical “evasive maneuver,” the simple response is that this more limited type of alleged “unfairness” can be *easily and entirely prevented* by requiring only that broadcasters give notice of job openings by a means *available to the general public*. Something far less expansive and burdensome than the FCC’s proposed “outreach” rules would thus fully satisfy this more limited (but still problematic) idea of “fairness.” The fact that the FCC has not proposed such a simple requirement, but instead has proposed detailed and burdensome “outreach” rules, tends to

(...Continued)

potential applicants”) & 22858 (¶53) (“not all have been given a fair opportunity to apply” without rules that “ensure fair opportunity to all job seekers”).

indicate that the FCC may be trying to accomplish something other than what it says it is trying to accomplish with the proposed new “outreach” rules. Be that as it may, however, the FCC’s logical premise that “fairness” is not possible without the proposed “outreach” rules is plainly invalid. The stated purpose of the proposed rules is thus inadequate for this reason as well.

2. The “Prong 2” Requirement that Notice of Job Openings Be Provided to Entities Requesting Such Notice Appears to Be Arbitrary

The second of the “outreach” rules’ three so-called “Prongs” requires that broadcasters provide “notice of all vacancies” to any entity which requests such notice and which “distributes information about employment opportunities to job seekers or refers job seekers to employers.”²⁹ Since almost any entity could make a colorable claim that it “distributes information about employment opportunities to job seekers,” the “Prong 2” requirement is essentially open-ended and could result in a broadcaster being required to provide notice of job openings to dozens or even hundreds of separate entities. The FCC states that this expansive requirement is needed to provide a “safety valve to ensure that no segment of the community is inadvertently omitted from recruitment efforts.” *Second Notice*, 16 F.C.C. Rcd. at 22851 (¶27). This statement of the purpose of the “Prong 2” requirement appears to be inadequate.

Under the proposed “outreach” rules, a broadcaster’s “Prong 1” “outreach” efforts are required to be described and documented in detail in (1) the broadcaster’s annual public inspection file report of its “outreach” practices, 16 F.C.C. Rcd. at 22853-55 (¶¶32-40); (2) the broadcaster’s Web site account of its “outreach” practices, *id.* at 22854 & 22856 (¶¶34, 36 & 44); (3) the broadcaster’s mid-license term filing with the FCC describing its “outreach”

²⁹ See former 47 C.F.R. §73.2080(c)(1)(ii), reproduced in *R&O*, 15 F.C.C. Rcd. at 2436 (Appendix C).

practices, *id.* at 22854-55 (¶¶35 & 41-42);³⁰ and (4) the broadcaster's license renewal filing with the FCC describing its "outreach" practices, *id.* at 22854 (¶35). The FCC does not explain why its own "expert" scrutiny, as well as general public scrutiny, of these many required public accountings of a broadcaster's "outreach" practices will not provide a "safety valve" sufficient to prevent any "segment" of the "community" from being "omitted." In light of the extensive reporting requirements contained in the other proposed "outreach" rules, the FCC's assertion that the expansive "Prong 2" "safety valve" requirement is also necessary appears to be inadequately explained, and therefore arbitrary. A rule not adequately explained is an arbitrary rule.

The "Prong 2" requirement also appears to be arbitrary, because it has no reasonable limits. By its literal terms, the "Prong 2" requirement would authorize essentially every entity that exists to require nearly every broadcaster in the country to supply it with notice of every broadcast job opening that occurs. The proposed rule would thus permit entities with no objective that would further the FCC's stated purpose for the "Prong 2" requirement (as well as entities with no legitimate purpose of any kind) to employ that requirement to force broadcasters to provide them with notice of all job openings. Under the proposed "Prong 2" rule, for example, any commercial employment agency could obtain without cost and in perpetuity a comprehensive and constantly updated data base of every job opening at nearly every broadcast station in the country (to say nothing of every cable television system and every other MVPD system in the country). If even one commercial business takes advantage of "Prong 2's" "golden opportunity" to obtain large amounts of valuable business information for free, many others are sure to follow. And this is only one possible manner of exploiting the FCC's proposed

³⁰ This mid-term FCC filing requirement applies to virtually all television stations, since very few television stations have four or fewer employees. *See Second Notice*, 16 F.C.C. Rcd. at 22855 (¶42).

“Prong 2” requirement to serve purely private commercial ends. The requirement could also be exploited for commercial purposes by subscription and advertiser-supported information services, periodicals and newsletters. It could be exploited by job placement consultants, recruitment services, industry “trackers,” investment analysts and even individual job seekers. It could also be used by media entities to monitor the actions of their competition.³¹ In each of these instances, and myriad others that could be imagined, the rule would require that the requested information be provided, and yet in *none* of these instances would the rule be acting as a “safety valve” to prevent some “segment” of the “community” from being “omitted” from broadcast recruitment efforts. A rule which strays so far from its stated purpose, and which requires so much more than what is needed to serve that purpose, appears to be arbitrary.

The “Prong 2” requirement would also effectively delegate to private entities the authority to require what the FCC itself states the proposed “outreach” rules are not intended to require: “the use of recruitment sources that are specifically targeted at minorities, women or any other group.” *See Second Notice*, 16 F.C.C. Rcd. at 22850 (¶23). For the FCC to state that it will not adopt a rule that requires the use of “targeted” recruitment sources, and then adopt a rule which effectively delegates to private entities the power to require, with the FCC’s imprimatur, that very thing, appears to be arbitrary. It also appears to be an unconstitutional delegation of the FCC’s law-making powers.

In addition, the proposed “Prong 2” requirement is arbitrary for many of the reasons stated earlier in connection with the proposed “Prong 1” requirement.

³¹ It could also be used by the malicious to burden or harm a media entity. Indeed, it could even be used by “hate groups” to obtain information about job openings at minority-owned stations.

**3. The "Prong 3" Requirement that Broadcasters Perform
Various So-Called "Menu Options" Appears to Be Arbitrary**

The last of the "outreach" rules' three so-called "Prongs" requires that broadcasters perform a "specified number of activities" selected from thirteen so-called "Menu Options" that "go beyond the normal recruitment activities directed at filling particular vacancies." *Second Notice*, 16 F.C.C. Rcd. at 22852 (¶28). These thirteen so-called "Menu Options" include: (1) eight which involve attendance at, participation in or sponsorship of "job fairs," "career days," "workshops," "conventions," "job banks," "Internet programs" and other "programs" and "events" with the apparent purpose of informing those in attendance about the existence and nature of "employment opportunities in broadcasting";³² (2) two which involve the award of scholarships or internships to assist persons "interested in pursuing a career in broadcasting";³³ (3) two which involve training and mentoring existing broadcast station personnel;³⁴ and (4) one (number 12) which involves listing actual job openings in a "job bank" or newsletter of a "media trade group whose membership includes substantial participation of women and minorities."³⁵

As is apparent, and also acknowledged by the FCC, none of the thirteen so-called "Menu Options" (other than the final one described above (number twelve), which appears to be

³² See former 47 C.F.R. §73.2080(c)(2)(i)-(iv), (vi), (x)-(xi) & (xii) (so-called "Menu Options" 1, 2, 3, 4, 6, 10, 11 and 13), reproduced in *R&O*, 15 F.C.C. Rcd. at 2436-37 (Appendix C). So-called "Menu Option 6" appears somewhat different than the other seven in this group, in that it is described as involving participation in "job banks," "Internet programs" and other "programs" designed to promote "outreach generally." *Id.* LTVG has no idea what type of "programs" would fit this description, other than perhaps religious assemblies or convocations that promote particular types of human behavior (e.g., "friendliness"), political advocacy or societal change.

³³ *Id.* at §73.2080(c)(2)(v) & (vii) (so-called "Menu Options" 5 and 7).

³⁴ *Id.* at §73.2080(c)(2)(viii) & (ix) (so-called "Menu Options" 8 and 9).

³⁵ *Id.* at §73.2080(c)(2)(xii) (so-called "Menu Option" 12).

unconstitutional under *Association*) has, or was intended by the FCC to have, any relationship to filling existing broadcast job openings with existing broadcast job seekers. The so-called “Prong 3 Menu Options” thus have no rational relationship to the FCC’s stated purpose for the proposed “outreach” rules – assuring “fair opportunity to all *job seekers*” through “broad and inclusive outreach *in recruitment*.” *Second Notice*, 16 F.C.C. Rcd. at 22858 (¶53) (emphasis supplied); *see also id.* at 22844 & 22847 (¶¶5 & 15). Because the “Prong 3” requirements have no rational connection to the FCC’s stated purpose for the “outreach” rules, any effort to justify them based on that stated purpose would be arbitrary.

The FCC’s central statement of what it intends the “Prong 3” requirements to accomplish is its statement that those requirements

are designed to encourage outreach to persons who *may not* yet be aware of the opportunities available in broadcasting . . . or have not yet acquired the experience to compete for current vacancies. Such persons *in the past may not* have been aware of available opportunities because of word-of-mouth recruitment practices.

Second Notice, 16 F.C.C. Rcd. at 22852 (¶28) (emphasis added). To base a detailed and burdensome set of federal regulations on the unexplained assertion that it is desirable to “encourage” (one notes that the proposed rule would *compel*) so-called “outreach” (the meaning of which, in this context, the FCC does not explain) due to what seems to be mere FCC speculation regarding what some unidentified group of people may or “may not” have been “aware of” “in the past” appears to be utterly arbitrary. To require broadcasters to engage in employment “outreach” to persons who “have not yet acquired the experience to compete for current vacancies” also appears to be arbitrary.

The FCC also states that, under the “Prong 3” requirements, “interested members of the community . . . will be encouraged to develop the knowledge and skills to pursue” jobs in

broadcasting. *Id.* Based on this statement, as well as the nature of the so-called “Menu Options” themselves, one might conclude that the “Prong 3” requirements are intended to further three basic goals: (1) to educate people as to the nature of the employment opportunities that exist in broadcasting; (2) to encourage people to pursue careers in broadcasting; and (3) to provide people who are pursuing or who wish to pursue such careers with forms of financial and other assistance and encouragement. The FCC has not clearly stated, however, that these are in fact the objectives of its proposed “Prong 3” requirements, nor has it given any other adequate explanation of the purpose of those requirements. The proposed “Prong 3” requirements are thus inadequately explained, and therefore arbitrary. A rule not adequately explained is an arbitrary rule.

In addition, assuming that the three above-stated goals are in fact those which the “Prong 3” requirements are intended to further (and assuming also that the FCC eventually makes this fact clear), the “Prong 3” requirements would still be arbitrary, because there is no rational basis for pursuing such goals through the coercive power of federal law. One reason for this is that there is *no shortage* of qualified employees in the broadcast industry. As a result of competition and consolidation in the industry, there are currently more qualified individuals who desire employment in the broadcast industry than there are available positions in the industry for them to fill. The apparent underlying objectives of the “Prong 3” requirements are thus worse than simply arbitrary – they are affirmatively misguided.

In addition, to attempt by FCC regulation to induce more people to pursue careers in broadcasting would be a little like passing a law designed to persuade more people to move to New York or Los Angeles and become actors. To work in broadcasting may not be quite the same as appearing on Broadway or having a star on the Hollywood “Walk of Fame,” but it is still

somewhat different, for example, than a career in “waste management” (nothing against that much-needed industry, and notwithstanding what a prior FCC Chairman once said about television). As compared to most businesses, a career in broadcasting is generally perceived as something of a “glamour” profession. No sensible reason exists for the FCC to adopt a set of federal regulations requiring that special efforts be made to encourage young people (or older folks) to select broadcasting as their chosen career. The FCC’s proposed “Prong 3” requirements are thus without any rational regulatory purpose.

This is not to say that the various so-called “Menu Option” activities are always and of necessity counterproductive. Broadcast stations may well decide that it is in the public interest (as well as their own) to pursue some such activities, and many (including LTVG members) already do so on a voluntarily basis. But for a federal government agency such as the FCC to *require* broadcasters to pursue such activities on a federally-mandated, federally-regimented and federally-policed basis is impossible to justify on any conceivable rational policy grounds. Insofar as LTVG is aware, *no attempt has ever been made to subject any other industry in the country to anything like the proposed “Prong 3” requirements.*

Moreover, even if one were to assume, as the FCC apparently does, that federally-mandated pursuit of the so-called “Prong 3 Menu Options” will invariably result in public benefits and not public harm, there is a further overwhelming difficulty with the FCC’s proposed “Prong 3” requirements. They are miles beyond anything that the FCC has the legal authority to require under the Communications Act.

The Communications Act directs the FCC to adopt regulations relating to the operation of broadcast stations, not “golden rules” requiring broadcast licensees to perform various kinds of FCC-specified “good works.” The Communications Act does *not* empower the FCC to require

broadcasters to pay a special tax to raise money for scholarships. The Communications Act also does *not* empower the FCC to require that broadcasters provide special employee training benefits in lieu of other possible employee benefits. And the Communications Act most certainly does *not* empower the FCC to compel a broadcaster's attendance and participation at "job fairs," "conventions," "workshops" and other forms of voluntary private associational gatherings. The FCC possesses *no statutory power of any kind* that would authorize the adoption of such requirements. Moreover, even if the Communications Act *did* permit such rules, the FCC would still be without the *constitutional* power to require broadcasters to perform the so-called "Menu Options," because all thirteen of those "optional" requirements are almost certainly invalid under the First and Fifth Amendments to the Constitution. The FCC cannot lawfully adopt, and therefore should not attempt to adopt, the proposed "Prong 3" requirements.

III. THE PROPOSED "OUTREACH" REGULATIONS APPEAR TO BE EITHER BEYOND THE FCC'S AUTHORITY OR UNCONSTITUTIONAL

In the *Second Notice*, the FCC states that its statutory authority to adopt the proposed new "outreach" rules is the same as that stated in the earlier *R&O* in support of the FCC's statutory authority to adopt the prior set of FCC EEO rules invalidated by the court in *Association*.³⁶ The *R&O*, in turn, gave four ostensible statutory bases for FCC authority to adopt its former set of EEO rules: (1) authority under Section 334 of the Communications Act; (2) "congressional ratification"; (3) authority under Section 309(j) of the Communications Act; and (4) the "public interest" provisions of Sections 301, 303, 307, 309 and 310 of the Communications Act.³⁷ It

³⁶ *Second Notice*, 16 F.C.C. Rcd. at 22847 n.21 (¶16), *citing R&O*, 15 F.C.C. Rcd. at 2335-58 (¶¶17-62).

³⁷ *R&O*, 15 F.C.C. Rcd. at 2336-58 (¶¶20-62). The FCC also relied on its authority under Section 634 of the Act, *id.* at 2335-36 (¶¶17-19), but Section 634 relates only to cable television (Continued...)

does not appear, however, that the FCC has the authority to adopt the proposed new “outreach” rules based on any of these asserted statutory grounds.

**A. Section 334 Provides No Statutory Basis
for the Proposed “Outreach” Rules**

Section 334(a) of the Communications Act states:

LIMITATION.—Except as specifically provided in this Section, the Commission shall not revise—

(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. §73.2080) as such regulations apply to television broadcast station licensees and permittees; or

(2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.

47 U.S.C. §334(a). Section 334(b) directs the FCC to revise its rules to require mid-license term review of television station employment practices, and Section 334(c) grants the FCC a very limited authority to revise its 1992 EEO rules “to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.” *Id.* §334(c). The plain language of Section 334 thus does not appear to provide the FCC with any authority to adopt a new set of “outreach” rules which departs in almost every substantive particular from the FCC’s 1992 EEO rules. The plain language of the section appears, in fact, to prohibit the FCC from doing this.

The FCC EEO rules that were in effect in 1992 are vastly different from the “outreach” rules that the FCC proposes to adopt in the *Second Notice*. See 47 C.F.R. §73.2080 (1991) (reproduced in Attachment 5). The requirements contained in the 1992 rules were also held, in major part, to be unconstitutional in *Lutheran Church and Association*. If Section 334 has any

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systems and therefore has no bearing on the FCC’s statutory authority to regulate the employment practices of broadcasters.

continuing force subsequent to *Lutheran Church and Association* (and the FCC appears to believe it does), that continuing effect could only involve one of the following two things: (1) The section might be thought currently to authorize the FCC to adopt new EEO regulations that are *substantively identical* to those portions of the FCC's 1992 EEO regulations that were not declared unconstitutional in *Lutheran Church* or *Association*; or (2) it might be thought to *require* the FCC to adopt such limited constitutional portions of its 1992 EEO regulations *and nothing more*. In either case, whether permissive or mandatory, Section 334's continuing effect would not authorize the FCC to adopt its new and entirely different proposed "outreach" rules and would in fact *affirmatively prohibit* such action. If, on the other hand, Section 334 does not have any continuing force and effect subsequent to *Lutheran Church and Association*, then it cannot authorize the FCC to do anything at all. In either event, Section 334 provides no authority for the FCC to adopt its proposed new set of "outreach" regulations.

What Section 334 *would* authorize, in spirit if not in words, is a set of FCC EEO regulations that grants recruitment and hiring preferences to minorities and women, as did the 1992 FCC rules which the section commanded to be kept in place. But that is something the FCC appears to maintain its proposed new "outreach" rules will not do. If the FCC is to be taken at its word, the proposed new rules could not possibly be authorized even under "the spirit" of Section 334. And if the FCC is not to be taken at its word, its proposed new "outreach" rules are unconstitutional under *Association* and *Lutheran Church*.

B. Section 309(j) Provides No Statutory Basis for the Proposed "Outreach" Rules

Section 309(j), insofar as is pertinent here, relates only to the award of preferences in FCC spectrum auctions to "businesses owned by members of minority groups and women." *E.g.*, 47 U.S.C. §309(j)(3)(B) & (4)(C)-(D). Statutory authority to afford preferences in FCC

spectrum auctions obviously does not constitute statutory authority to regulate the employment practices of broadcast stations. Moreover, even by the most expansive reading of Section 309(j) imaginable, the section could only provide the statutory authority for EEO rules which establish, as does Section 309(j), *affirmative preferences* for females and minorities. The FCC maintains that its proposed “outreach” rules do not do that. If that is true, then the rules could not possibly be authorized by Section 309(j). And if that is *not* true, the proposed rules are unconstitutional under *Association* and *Lutheran Church*.

**C. The “Public Interest” Standard and “Congressional Ratification”
Provide No Statutory Basis for the Proposed “Outreach” Rules**

Finally, the FCC has claimed, apparently, that its proposed “outreach” rules are authorized because they are designed to promote “program diversity” under the Communications Act’s “public interest” standard; or because they have been “ratified” by past congressional inaction.³⁸ Neither of these asserted grounds provides any statutory authority for the proposed “outreach” rules, however.

The asserted “program diversity” rationale for FCC EEO rules was expressly rejected in *Lutheran Church*, 141 F.3d at 354-55 (“We doubt . . . that the Constitution permits the government to take account of racially-based differences [in matters of taste or opinion], much less encourage them.”). The “program diversity” rationale cannot therefore provide a statutory basis for FCC regulation of employment practices. Moreover, the entire idea of supporting the proposed new “outreach” rules based on a “program diversity” rationale makes no sense. The “program diversity” rationale for past FCC EEO rules was premised on the assumption that the female and minority recruitment preferences contained in the FCC’s former EEO rules would

³⁸ See *Second Notice*, 16 F.C.C. Rcd. 22847 n.21 (¶16), citing *R&O*, 15 F.C.C. Rcd. at 2337-46 & 2349-58 (¶¶23-41 & 48-62).

result in more females and minorities in the broadcast workforce, and would thereby lead to more programming reflecting the views and concerns of females and minorities. *See, e.g., id.* The FCC claims, however, that its proposed new “outreach” rules contain no such unconstitutional employment preferences and are intended only to promote “fairness” to “everybody.”³⁹ There is thus no logical connection between the proposed “outreach” rules, at least as the FCC has explained them, and the goal of promoting “program diversity.”

As to “congressional ratification,” Congress cannot possibly have “ratified” by its past inaction a set of “outreach” rules that, according to the FCC, represents a radical departure from the FCC’s entire past history and practice with respect to broadcast EEO regulation. Always in the past, the FCC’s EEO rules have granted express or implied preferences to females and minorities in broadcast recruitment and hiring practices. Under the proposed new “outreach” rules, according to the FCC, this will not occur. It was the *former* FCC approach involving female and minority preferences, if anything, that Congress “ratified” by its past inaction. *Cf.* 47 U.S.C. §334. If that former approach is not embodied in the proposed new rules, then the new rules cannot possibly have been “ratified” by congressional inaction. And if the FCC’s former approach *is* in fact hidden somewhere beneath the veneer of the FCC’s less than clear explanations of the proposed new “outreach” rules, then the proposed new rules are, once again, unconstitutional under *Association and Lutheran Church*.

No statutory authority for the FCC’s proposed new “outreach” rules thus exists under any of the four rationales offered by the FCC, assuming that the proposed new rules are what the FCC claims them to be. The only EEO rules that might arguably be authorized by the provisions

³⁹ See note 28, *supra*.

of the Communications Act cited by the FCC are rules that would be unconstitutional, because not race and gender neutral, under the decisions in *Lutheran Church and Association*.

IV. ANY “OUTREACH” REGULATIONS WHICH THE FCC ADOPTS SHOULD NOT PLACE ARBITRARY BURDENS ON BROADCASTERS

LTVG assumes that, notwithstanding its objections and those of others, the FCC will ultimately adopt some form of “outreach” rules. If this occurs, and if the rules are not challenged in court (if they are, it seems likely they will be set aside), LTVG member stations will be required to live with those rules and to comply with them. With this in mind, LTVG offers the following suggestions for how the FCC might make broadcast “outreach” rules, if not desirable or even fully rational and lawful, at least less burdensome and more tolerable for broadcasters:

- Specify that it is sufficient if broadcasters provide notice of job openings by at least one means available to the general public, such as an Internet-posting or a “want ad” published in a newspaper of general circulation in the community. That is all that is even arguably necessary to achieve the FCC’s stated objective of “fairness” to “all potential job applicants.”
- Specify that broadcasters are not required to engage in recruitment “outreach” for all full-time job openings, and decline to adopt any quantitative standard specifying how often such “outreach” must be pursued. Broadcasters should be free to use their good faith judgment in determining how often to pursue recruitment “outreach.” (If the FCC nevertheless decides to adopt some form of quantitative standard, it should specify a guideline indicating that broadcasters who do not employ recruitment “outreach” for at least half of all full-time job openings in a given year may be required to justify their practices.) Specify also that no recruitment “outreach” need be used in connection with any hire involving a two percent or greater equity owner of the station, or a member of such an owner’s immediate family (spouse, parent, grandparent, child, or grandchild). Under these proposals, broadcasters will be able to make “urgent hires,” to use standard types of employee search

techniques for potential employees located in other markets, to hire individuals with unique talents when such an opportunity presents itself, to hire family members in a family-owned business, and to otherwise engage in perfectly normal and fair employment practices that are also inconsistent with the FCC's proposed "outreach" requirements.

- Specify that television stations with fewer than one hundred full-time employees will not be subject to the proposed "outreach" rules or any associated EEO record keeping and filing requirements. This would make the FCC's rules essentially parallel to the EEOC's current rules and would exempt small business from the substantial burdens and costs entailed by the FCC's proposed "outreach" rules. Small businesses clearly deserve such an exemption, particularly if the FCC ultimately adopts "outreach" rules that are anything like as elaborate and burdensome as the rules the FCC has proposed to adopt.
- Specify that, for larger businesses that are required to file EEOC Form EEO-1, no duplicative FCC Form 395-B filing will be required. To require two duplicative federal regulatory filings is a paradigmatic example of an undue federal regulatory burden, and it is no justification for such a duplication of burden to maintain that an agency needs to "report to Congress" its own particular set of data, when that data is distinguishable from available EEOC data only by what amounts to the FCC's own minor, idiosyncratic statistical preferences.
- Specify that no filing of data which reflects the race, gender or ethnicity of employees, job applicants or hires will be required, unless such a filing is and will remain in all circumstances completely anonymous in nature. This is necessary (although possibly not sufficient) to ensure that such a filing requirement, and all "outreach" or other EEO rules to which it may expressly or implicitly relate, remain consistent with the Constitution. (Under the FCC's prior rules, the FCC created the impression that such filings would not

be “public” and then posted them on its Web site. This type of action must not be repeated.)

- Decline to adopt the proposed requirement that broadcasters post their annual EEO public file reports on their Web sites. This requirement is unduly burdensome, and it is also probably unconstitutional under the First Amendment.
- Decline to adopt the so-called “Prong 2” requirement in its entirety. That requirement is clearly overbroad and arbitrary as currently formulated, and there is no way to narrow it that would be consistent with both the FCC’s statutory authority and the Constitution.
- Decline to adopt the so-called “Prong 3” requirements in their entirety. Every constituent element of those requirements is well beyond the FCC’s statutory authority and is also almost certainly unconstitutional.

V. CONCLUSION

For the foregoing reasons, the FCC should not adopt any “outreach” rules. If the FCC nevertheless adopts “outreach” rules, those rules should incorporate each of the suggestions described immediately above.

Respectfully submitted


J. Brian DeBoice

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Counsel for **THE LOCAL TELEVISION GROUP**

Dated: April 15, 2002

**THE LOCAL TELEVISION GROUP
MEMBER STATIONS**

<u>Station</u>	<u>Licensee</u>	<u>City of License</u>
KBMT	Channel 12 of Beaumont, Inc.	Beaumont, TX
KDOC-TV	Golden Orange Broadcasting Co., Inc.	Anaheim, CA
KFRE-TV	Sanger Telecasters, Inc.	Sanger, CA
KHSL-TV	Catamount Broadcasting of Chico-Redding, Inc.	Chico, CA
KIDY(TV)	Sage Broadcasting Corporation	San Angelo, TX
KIII	Channel 3 of Corpus Christi, Inc.	Corpus Christi, TX
KMVT(TV)	Catamount-Idaho License LLC	Twin Falls, Idaho
KTKA-TV	Northeast Kansas Broadcast Service, Inc.	Topeka, KS
KUSI-TV	Channel 51 of San Diego, Inc.	San Diego, CA
KXJB-TV	Catamount Broadcasting of Fargo LLC	Valley City, ND
KXVA(TV)	Star Broadcasting Limited	Abilene, TX
WCIU-TV WDJT-TV	Weigel Broadcasting Co.	Chicago, IL Milwaukee, WI
WLNY(TV)	WLNY-TV Inc.	Riverhead, NY
WMDT	Delmarva Broadcast Service General Partnership	Salisbury, MD

The U.S. Equal Employment Opportunity Commission

2000 EEO-1 AGGREGATE REPORT
SIC 483: Radio and Television Broadcasting
(1044 UNITS)

Racial/Ethnic Group and Sex	Number Employed									
	Total Employment	Officials & Managers	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
ALL EMPLOYEES	136809	19185	49051	28636	14753	21102	1071	1351	699	961
Men	80069	11902	29595	23600	6529	5465	911	984	500	583
Women	56740	7283	19456	5036	8224	15637	160	367	199	378
WHITE	105968	16233	38579	21782	12435	14181	853	953	479	473
Men	64192	10502	24185	18136	5519	3783	727	705	329	306
Women	41776	5731	14394	3646	6916	10398	126	248	150	167
MINORITY	30841	2952	10472	6854	2318	6921	218	398	220	488
Men	15877	1400	5410	5464	1010	1682	184	279	171	277
Women	14964	1552	5062	1390	1308	5239	34	119	49	211
BLACK	16661	1470	5561	3785	1295	3779	110	222	82	357
Men	8361	663	2860	2907	592	831	99	150	65	194

Women	8300	807	2701	878	703	2948	11	72	17	163
HISPANIC	10514	1031	3501	2391	780	2363	82	135	125	106
Men	5891	549	2002	2021	342	641	67	107	97	65
Women	4623	482	1499	370	438	1722	15	28	28	41
ASIAN AMERICAN	2992	340	1198	516	176	672	24	37	10	19
Men	1265	134	430	405	53	186	16	21	6	14
Women	1727	206	768	111	123	486	8	16	4	5
AMERICAN INDIAN	674	111	212	162	67	107	2	4	3	6
Men	360	54	118	131	23	24	2	1	3	4
Women	314	57	94	31	44	83	0	3	0	2

PARTICIPATION RATE

ALL EMPLOYEES	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Men	58.5	62.0	60.3	82.4	44.3	25.9	85.1	72.8	71.5	60.7
Women	41.5	38.0	39.7	17.6	55.7	74.1	14.9	27.2	28.5	39.3
WHITE	77.5	84.6	78.7	76.1	84.3	67.2	79.6	70.5	68.5	49.2
Men	46.9	54.7	49.3	63.3	37.4	17.9	67.9	52.2	47.1	31.8
Women	30.5	29.9	29.3	12.7	46.9	49.3	11.8	18.4	21.5	17.4
MINORITY	22.5	15.4	21.3	23.9	15.7	32.8	20.4	29.5	31.5	50.8

Men	11.6	7.3	11.0	19.1	6.8	8.0	17.2	20.7	24.5	28.8
Women	10.9	8.1	10.3	4.9	8.9	24.8	3.2	8.8	7.0	22.0
BLACK	12.2	7.7	11.3	13.2	8.8	17.9	10.3	16.4	11.7	37.1
Men	6.1	3.5	5.8	10.2	4.0	3.9	9.2	11.1	9.3	20.2
Women	6.1	4.2	5.5	3.1	4.8	14.0	1.0	5.3	2.4	17.0
HISPANIC	7.7	5.4	7.1	8.3	5.3	11.2	7.7	10.0	17.9	11.0
Men	4.3	2.9	4.1	7.1	2.3	3.0	6.3	7.9	13.9	6.8
Women	3.4	2.5	3.1	1.3	3.0	8.2	1.4	2.1	4.0	4.3
ASIAN AMERICAN	2.2	1.8	2.4	1.8	1.2	3.2	2.2	2.7	1.4	2.0
Men	0.9	0.7	0.9	1.4	0.4	0.9	1.5	1.6	0.9	1.5
Women	1.3	1.1	1.6	0.4	0.8	2.3	0.7	1.2	0.6	0.5
AMERICAN INDIAN	0.5	0.6	0.4	0.6	0.5	0.5	0.2	0.3	0.4	0.6
Men	0.3	0.3	0.2	0.5	0.2	0.1	0.2	0.1	0.4	0.4
Women	0.2	0.3	0.2	0.1	0.3	0.4	0.0	0.2	0.0	0.2

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PUBLIC NOTICE

ATTACHMENT 3

**Federal Communications Commission
1919 M St., N.W.
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June 23, 1998 84031

1997 BROADCAST AND CABLE EMPLOYMENT REPORT

The Commission today is releasing the attached five-year (1993-1997) minority and female employment trend reports for the broadcast and cable industries. The data are compiled from the Annual Employment Reports that broadcasters and cable operators file showing the composition of their staffs by gender, race and/or national origin.

Overall broadcast industry employment for stations having five or more full-time employees increased from 146,616 in 1996 to 149,975 in 1997. Of all full-time broadcast employees, female representation increased from 40.8% to 41.0% and minority representation increased from 19.9% to 20.2%. Of the total full-time employees in the upper-four job categories (Officials and Managers, Professionals, Technicians, and Sales Workers) women increased from 34.4% to 34.9% and minorities increased from 17.8% to 18.2%.

Overall cable industry employment increased at units having more than five employees from 120,530 in 1996 to 127,927 in 1997. Total female representation increased from 41.7% to 42.0% while minority representation increased from 28.2% to 29.1%. Of the total full-time employees in the upper-level job categories, females increased from 29.3% to 29.4% and minorities increased from 20.8% to 20.9%.

The 1997 national labor force included 46.2% women and 26.0% minorities.

Complete state-by-state reports may be inspected either in the FCC Library, Room 639, or in the Public Service Division, OPA, Room 254, 1919 M Street, N.W. Copies may be purchased from the FCC's duplicating contractor, International Transcript Services (202) 857-3800. For additional information concerning the data contact the EEO Branch at (202) 418-1450.

-FCC-

EQUAL EMPLOYMENT OPPORTUNITY TREND REPORT
PREPARED FOR FCC INDUSTRY EEO UNIT
DATE PREPARED 06/05/98

BEE00901 Page 755

BROADCAST

UNITED STATES

NATIONAL TOTALS

JOB CATEGORY	TOTAL EMPLYS	TOTAL FEMALE	TOTAL MALES	TOTAL MINOR	-----FEMALE MINORITIES-----				-----MALE MINORITIES-----			
					BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC	BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC
OFFICIALS & MGRS NR 1997	29,241	10,417	18,824	4,144	961	219	97	692	907	156	138	974
% Total 1997	29,241	35.6	64.4	14.2	3.3	0.7	0.3	2.4	3.1	0.5	0.5	3.3
% Total 1996	29,572	35.4	64.6	14.0	3.4	0.7	0.4	2.3	3.1	0.6	0.5	3.1
% Total 1995	31,598	35.5	64.5	13.9	3.4	0.7	0.4	2.3	3.0	0.6	0.5	3.1
% Total 1994	30,633	34.9	65.1	12.9	3.3	0.7	0.4	2.1	2.8	0.6	0.5	2.7
% Total 1993	30,393	33.9	66.1	12.6	3.1	0.6	0.3	2.0	2.7	0.5	0.4	2.9
PROFESSIONALS NR 1997	50,615	18,190	32,425	9,713	2,349	647	138	1,368	2,440	376	225	2,170
% Total 1997	50,615	35.9	64.1	19.2	4.6	1.3	0.3	2.7	4.8	0.7	0.4	4.3
% Total 1996	48,939	35.2	64.8	18.8	4.6	1.2	0.3	2.5	4.8	0.7	0.4	4.2
% Total 1995	50,517	34.5	65.5	18.6	4.4	1.1	0.3	2.4	5.0	0.7	0.4	4.2
% Total 1994	47,255	33.3	66.7	17.2	4.2	1.0	0.2	2.2	4.9	0.6	0.4	3.7
% Total 1993	46,665	33.1	66.9	17.2	4.1	0.9	0.2	2.2	4.8	0.6	0.4	4.0
TECHNICIANS NR 1997	26,626	4,054	22,572	6,464	699	116	40	309	2,569	400	148	2,183
% Total 1997	26,626	15.2	84.8	24.3	2.6	0.4	0.2	1.2	9.6	1.5	0.6	8.2
% Total 1996	25,417	14.9	85.1	23.8	2.6	0.4	0.1	1.0	9.7	1.6	0.5	7.7
% Total 1995	25,887	14.5	85.5	23.5	2.5	0.4	0.1	1.0	9.7	1.6	0.5	7.7
% Total 1994	24,372	14.2	85.8	22.3	2.4	0.4	0.1	0.9	9.3	1.6	0.5	7.2
% Total 1993	24,732	13.9	86.1	22.3	2.4	0.3	0.1	0.9	9.2	1.6	0.5	7.2
SALES WORKERS NR 1997	23,322	12,624	10,698	3,281	779	144	83	725	739	76	65	670
% Total 1997	23,322	54.1	45.9	14.1	3.3	0.6	0.4	3.1	3.2	0.3	0.3	2.9
% Total 1996	22,690	53.3	46.7	14.0	3.4	0.6	0.4	3.0	3.2	0.4	0.3	2.8
% Total 1995	23,785	53.0	47.0	13.6	3.4	0.6	0.3	2.8	3.2	0.3	0.2	2.8
% Total 1994	23,016	51.4	48.6	12.6	2.9	0.6	0.2	2.6	3.1	0.3	0.3	2.5
% Total 1993	22,405	51.6	48.4	12.2	2.9	0.5	0.2	2.5	2.9	0.3	0.2	2.6
OFFICE/CLERICAL NR 1997	18,156	18,854	2,302	5,798	2,560	399	138	1,963	334	67	29	308
% Total 1997	18,156	87.3	12.7	31.9	14.1	2.2	0.8	10.8	1.8	0.4	0.2	1.7
% Total 1996	18,050	88.2	11.8	32.2	14.2	2.3	0.8	10.7	1.8	0.4	0.1	1.8
% Total 1995	19,072	88.2	11.8	32.4	14.3	2.3	0.8	10.7	1.9	0.4	0.1	2.0
% Total 1994	18,070	88.2	11.8	30.2	13.8	2.2	0.7	9.6	1.8	0.3	0.1	1.5
% Total 1993	17,941	89.1	10.9	29.8	13.9	2.0	0.7	9.5	1.8	0.3	0.1	1.5

BROADCAST

UNITED STATES

NATIONAL TOTALS

JOB CATEGORY	TOTAL EMPLYS	TOTAL FEMALE	TOTAL MALES	TOTAL MINOR	-----FEMALE MINORITIES-----				-----MALE MINORITIES-----			
					BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC	BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC
CRAFTSMEN NR 1997	785	175	610	258	28	1	1	21	68	6	9	124
% Total 1997	785	22.3	77.7	32.9	3.6	0.1	0.1	2.7	8.7	0.8	1.1	15.8
% Total 1996	696	15.5	84.5	32.2	1.3	0.6	0.6	2.2	5.2	3.9	1.1	17.4
% Total 1995	832	16.2	83.8	34.1	2.5	0.2	0.1	3.0	6.5	1.9	0.7	19.1
% Total 1994	972	24.6	75.4	28.3	4.4	0.7	0.4	2.3	5.6	1.9	0.3	12.8
% Total 1993	993	25.3	74.7	23.2	2.3	0.6	0.0	3.1	4.9	1.2	0.5	10.5
OPERATIVES NR 1997	596	102	494	218	12	0	2	13	76	4	2	109
% Total 1997	596	17.1	82.9	36.6	2.0	0.0	0.3	2.2	12.8	0.7	0.3	18.3
% Total 1996	622	14.1	85.9	35.5	1.6	0.2	0.8	2.3	10.8	1.0	0.8	18.2
% Total 1995	711	18.1	81.9	34.5	2.5	1.0	0.4	2.4	9.4	2.1	0.6	16.0
% Total 1994	635	16.1	83.9	32.3	1.7	0.9	0.9	1.4	11.5	1.3	0.5	14.0
% Total 1993	650	16.3	83.7	33.4	2.9	1.1	0.5	1.5	13.8	0.9	0.5	12.2
LABORERS NR 1997	181	23	158	94	6	1	0	5	33	3	1	45
% Total 1997	181	12.7	87.3	51.9	3.3	0.6	0.0	2.8	18.2	1.7	0.6	24.9
% Total 1996	178	11.2	88.8	54.5	3.9	0.6	0.0	2.2	17.4	1.7	0.6	28.1
% Total 1995	212	13.2	86.8	54.2	4.7	0.5	0.0	2.4	18.9	2.8	1.4	23.6
% Total 1994	194	13.9	86.1	55.7	4.6	0.0	0.0	3.1	14.4	2.6	1.0	29.9
% Total 1993	217	15.2	84.8	50.2	5.1	0.5	0.0	3.7	17.5	0.0	0.5	23.0
SERVICES NR 1997	453	87	366	284	36	0	0	13	118	14	3	100
% Total 1997	453	19.2	80.8	62.7	7.9	0.0	0.0	2.9	26.0	3.1	0.7	22.1
% Total 1996	452	19.2	80.8	62.2	8.0	0.0	0.0	4.4	27.7	2.9	0.4	18.8
% Total 1995	473	19.7	80.3	65.8	6.3	1.3	0.0	4.9	26.2	3.8	0.4	22.8
% Total 1994	495	19.0	81.0	63.8	9.3	0.2	0.0	2.6	30.5	2.8	0.6	17.8
% Total 1993	498	19.1	80.9	61.4	9.4	0.2	0.0	3.2	27.7	2.6	0.6	17.7
TOTAL ALL JOBS NR 1997	149,975	61,526	88,449	30,254	7,430	1,527	499	5,109	7,284	1,102	620	6,683
% Total 1997	149,975	41.0	59.0	20.2	5.0	1.0	0.3	3.4	4.9	0.7	0.4	4.5
% Total 1996	146,616	40.8	59.2	19.9	5.0	1.0	0.4	3.3	4.8	0.8	0.4	4.3
% Total 1995	153,058	40.7	59.3	19.7	4.9	1.0	0.4	3.3	4.8	0.7	0.4	4.3
% Total 1994	145,645	39.9	60.1	18.4	4.7	0.9	0.3	2.9	4.7	0.7	0.4	3.8
% Total 1993	144,494	39.6	60.4	18.2	4.6	0.8	0.3	2.9	4.6	0.7	0.3	4.0

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CABLE TV EQUAL EMPLOYMENT OPPORTUNITY
FIVE YEAR TREND REPORT
(STATE NAME SEQUENCE)

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CEE009-01

United States

National Totals

JOB CATEGORY		TOTAL EMPLOYEE'S	TOTAL FEMALE	TOTAL MALES	TOTAL MINOR	-----FEMALE MINORITIES-----				-----MALE MINORITIES-----			
						BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC	BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC
Officials & Managers	1997	17,957	6,471	11,486	2,962	815	106	46	369	809	169	103	545
	% Total 1997	17,957	36.0	64.0	16.5	4.5	0.6	0.3	2.1	4.5	0.9	0.6	3.0
	% Total 1996	17,046	35.9	64.1	15.5	4.2	0.6	0.2	2.0	4.3	0.8	0.6	2.8
	% Total 1995	17,032	35.9	64.1	14.4	3.7	0.7	0.3	1.9	3.8	0.8	0.5	2.7
	% Total 1994	16,713	35.6	64.4	13.5	3.5	0.7	0.3	1.8	3.6	0.7	0.5	2.5
	% Total 1993	15,643	35.9	64.1	13.2	3.6	0.5	0.2	1.9	3.5	0.7	0.5	2.3
Professionals	1997	6,068	2,846	3,222	1,111	321	98	9	168	231	101	16	167
	% Total 1997	6,068	46.9	53.1	18.3	5.3	1.6	0.1	2.8	3.8	1.7	0.3	2.8
	% Total 1996	5,338	47.8	52.2	16.9	5.1	1.5	0.3	2.7	3.3	1.4	0.3	2.3
	% Total 1995	5,165	47.4	52.6	16.9	4.8	1.6	0.3	2.7	3.2	1.7	0.4	2.2
	% Total 1994	4,783	47.9	52.1	15.8	4.6	1.4	0.2	2.7	3.3	1.3	0.3	2.1
	% Total 1993	4,769	47.5	52.5	15.8	4.8	1.4	0.3	2.3	3.5	1.2	0.3	2.0
Technicians	1997	17,499	1,354	16,145	4,058	194	44	7	86	1,985	402	104	1,236
	% Total 1997	17,499	7.7	92.3	23.2	1.1	0.3	0.0	0.5	11.3	2.3	0.6	7.1
	% Total 1996	17,351	8.1	91.9	22.5	1.2	0.3	0.0	0.5	10.9	2.1	0.7	6.8
	% Total 1995	16,703	7.6	92.4	22.1	1.1	0.3	0.0	0.5	10.5	2.4	0.7	6.6
	% Total 1994	15,954	7.9	92.1	21.6	1.2	0.3	0.0	0.5	10.2	2.3	0.7	6.4
	% Total 1993	15,362	8.4	91.6	21.7	1.2	0.3	0.1	0.5	10.4	2.3	0.6	6.4
Sales Workers	1997	9,759	4,388	5,371	2,599	796	69	25	288	862	108	25	426
	% Total 1997	9,759	45.0	55.0	26.6	8.2	0.7	0.3	3.0	8.8	1.1	0.3	4.4
	% Total 1996	10,594	44.2	55.8	28.4	8.8	0.7	0.3	3.2	9.1	1.2	0.2	4.9
	% Total 1995	11,080	47.1	52.9	28.1	9.5	0.6	0.3	3.6	8.3	1.2	0.2	4.4
	% Total 1994	11,029	46.8	53.2	28.8	9.7	0.5	0.4	3.8	8.5	1.2	0.2	4.5
	% Total 1993	11,545	47.2	52.8	28.8	10.4	0.6	0.4	3.4	8.5	1.0	0.2	4.3
Office/Clerical	1997	44,156	36,910	7,246	16,790	8,728	657	242	3,984	1,821	226	56	1,076
	% Total 1997	44,156	83.6	16.4	38.0	19.8	1.5	0.5	9.0	4.1	0.5	0.1	2.4
	% Total 1996	40,478	84.2	15.8	36.5	18.6	1.3	0.6	9.1	3.9	0.5	0.1	2.3
	% Total 1995	37,840	84.7	15.3	35.1	17.4	1.5	0.6	9.1	3.5	0.5	0.1	2.3
	% Total 1994	35,790	85.5	14.5	33.3	16.8	1.3	0.6	8.6	3.2	0.5	0.1	2.1
	% Total 1993	33,963	86.3	13.7	32.3	16.5	1.2	0.6	8.5	3.0	0.4	0.1	2.0

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CABLE TV EQUAL EMPLOYMENT OPPORTUNITY
FIVE YEAR TREND REPORT
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United States

National Totals

JOB CATEGORY		TOTAL EMPLOYEE'S	TOTAL FEMALE	TOTAL MALES	TOTAL MINOR	-----FEMALE MINORITIES-----				-----MALE MINORITIES-----			
						BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC	BLACK	ASIAN PAC/ISL	AM IND/ ALASKAN	HIS- PANIC
Craftsmen	1997	13,744	636	13,108	3,526	115	15	5	51	1,809	222	107	1,202
	% Total 1997	13,744	4.6	95.4	25.7	0.8	0.1	0.0	0.4	13.2	1.6	0.8	8.7
	% Total 1996	11,843	3.8	96.2	24.4	0.6	0.1	0.0	0.2	12.6	1.3	0.9	8.6
	% Total 1995	11,461	4.1	95.9	23.7	0.7	0.1	0.0	0.3	11.4	1.5	1.0	8.7
	% Total 1994	11,353	4.3	95.7	23.1	0.7	0.1	0.0	0.3	11.4	1.1	0.9	8.6
	% Total 1993	11,350	4.4	95.6	21.3	0.6	0.1	0.1	0.3	10.7	1.0	0.8	7.7
Operatives	1997	17,338	882	16,456	5,746	162	34	12	59	2,794	475	136	2,074
	% Total 1997	17,338	5.1	94.9	33.1	0.9	0.2	0.1	0.3	16.1	2.7	0.8	12.0
	% Total 1996	16,585	5.0	95.0	32.4	0.8	0.1	0.0	0.4	16.1	2.3	0.8	11.8
	% Total 1995	15,587	5.5	94.5	31.6	0.7	0.1	0.0	0.4	15.6	2.6	0.7	11.3
	% Total 1994	15,461	5.4	94.6	30.0	0.7	0.1	0.1	0.4	15.1	2.3	0.8	10.5
	% Total 1993	15,509	5.5	94.5	28.8	0.7	0.1	0.1	0.4	14.6	2.2	0.6	10.1
Laborers	1997	1,189	151	1,038	380	25	0	3	14	168	22	6	142
	% Total 1997	1,189	12.7	87.3	32.0	2.1	0.0	0.3	1.2	14.1	1.9	0.5	11.9
	% Total 1996	1,029	12.1	87.9	32.0	1.9	0.0	0.1	1.0	16.0	1.7	0.5	10.8
	% Total 1995	940	10.5	89.5	30.5	1.3	0.1	0.1	0.5	15.6	1.9	0.1	10.9
	% Total 1994	928	10.8	89.2	29.6	1.8	0.1	0.3	0.8	14.1	2.2	0.6	9.7
	% Total 1993	878	10.3	89.7	29.6	2.3	0.1	0.2	0.5	16.9	1.5	0.5	7.7
Service	1997	217	63	154	63	5	0	0	3	20	3	2	30
	% Total 1997	217	29.0	71.0	29.0	2.3	0.0	0.0	1.4	9.2	1.4	0.9	13.8
	% Total 1996	266	31.2	68.8	34.2	2.3	0.0	0.0	1.9	12.8	1.5	0.0	15.8
	% Total 1995	248	38.7	61.3	28.2	2.0	0.4	0.0	3.6	11.3	1.2	0.0	9.7
	% Total 1994	228	41.7	58.3	28.5	2.2	0.4	0.4	3.1	11.4	0.9	0.4	9.6
	% Total 1993	211	38.4	61.6	25.6	1.9	0.5	0.5	1.9	13.3	0.5	0.9	6.2
Total All Jobs	1997	127,927	53,701	74,226	37,235	11,161	1,023	349	5,022	10,499	1,728	555	6,898
	% Total 1997	127,927	42.0	58.0	29.1	8.7	0.8	0.3	3.9	8.2	1.4	0.4	5.4
	% Total 1996	120,530	41.7	58.3	28.2	8.2	0.7	0.3	3.9	8.0	1.2	0.5	5.3
	% Total 1995	116,056	41.9	58.1	27.1	7.7	0.8	0.3	3.9	7.5	1.3	0.4	5.1
	% Total 1994	112,239	41.7	58.3	26.0	7.4	0.7	0.3	3.7	7.4	1.2	0.4	4.9
	% Total 1993	109,230	41.6	58.4	25.3	7.3	0.6	0.3	3.5	7.3	1.1	0.4	4.7

The U.S. Equal Employment Opportunity Commission

Occupational Employment in Private Industry by Race/Ethnic Group/Sex, and by Industry, United States, 2000

ALL INDUSTRIES (197072 UNITS)

Race / Ethnic Group / Sex	Total Employment	Officials & Managers	Professionals	Technicians	Sales Workers	Office & Clerical Workers	Craft Workers	Operatives	Laborers	Service Workers
NUMBER EMPLOYED										
ALL EMPLOYEES	43,995,543	4,721,056	7,011,359	2,670,846	5,357,927	6,271,610	3,492,410	6,030,763	3,449,195	4,990,377
MALE	23,272,569	3,124,974	3,423,726	1,477,351	2,333,475	1,236,197	3,041,845	4,271,365	2,232,870	2,130,766
FEMALE	20,722,974	1,596,082	3,587,633	1,193,495	3,024,452	5,035,413	450,565	1,759,398	1,216,325	2,859,611
WHITE	31,141,848	4,041,205	5,678,392	2,021,657	3,920,011	4,377,333	2,702,541	3,898,351	1,811,664	2,690,694
MALE	16,716,131	2,716,179	2,808,560	1,139,903	1,765,889	812,237	2,387,962	2,844,823	1,170,177	1,070,401
FEMALE	14,425,717	1,325,026	2,869,832	881,754	2,154,122	3,565,096	314,579	1,053,528	641,487	1,620,293
MINORITY	12,853,695	679,851	1,332,967	649,189	1,437,916	1,894,277	789,869	2,132,412	1,637,531	2,299,683
MALE	6,556,438	408,795	615,166	337,448	567,586	423,960	653,883	1,426,542	1,062,693	1,060,365
FEMALE	6,297,257	271,056	717,801	311,741	870,330	1,470,317	135,986	705,870	574,838	1,239,318
BLACK	6,177,400	303,145	477,735	306,826	747,955	1,070,196	344,957	1,046,174	672,535	1,207,877

	MALE	2,816,081	163,569	167,485	129,608	271,402	206,748	276,939	682,486	429,368	488,476
	FEMALE	3,361,319	139,576	310,250	177,218	476,553	863,448	68,018	363,688	243,167	719,401
HISPANIC		4,547,834	210,861	263,167	174,431	491,408	564,392	338,706	812,366	824,329	868,174
	MALE	2,629,151	137,389	130,338	107,483	211,513	143,298	293,637	583,557	553,170	468,766
	FEMALE	1,918,683	73,472	132,829	66,948	279,895	421,094	45,069	228,809	271,159	399,408
ASIAN/PACIFIC ISLANDER		1,873,998	147,846	565,665	152,127	163,805	225,186	82,062	232,360	115,013	189,934
	MALE	977,226	96,246	304,351	91,517	71,406	66,200	62,343	132,941	63,479	88,743
	FEMALE	896,772	51,600	261,314	60,610	92,399	158,986	19,719	99,419	51,534	101,191
AMIND/ALASKAN NATIVE		254,463	17,999	26,400	15,805	34,748	34,503	24,144	41,512	25,654	33,698
	MALE	133,980	11,591	12,992	8,840	13,265	7,714	20,964	27,558	16,676	14,380
	FEMALE	120,483	6,408	13,408	6,965	21,483	26,789	3,180	13,954	8,978	19,318
PARTICIPATION RATE											
ALL EMPLOYEES		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
	MALE	52.9	66.2	48.8	55.3	43.6	19.7	87.1	70.8	64.7	42.7
	FEMALE	47.1	33.8	51.2	44.7	56.4	80.3	12.9	29.2	35.3	57.3
WHITE		70.8	85.6	81.0	75.7	73.2	69.8	77.4	64.6	52.5	53.9
	MALE	38.0	57.5	40.1	42.7	33.0	13.0	68.4	47.2	33.9	21.4

	FEMALE	32.8	28.1	40.9	33.0	40.2	56.8	9.0	17.5	18.6	32.5
MINORITY		29.2	14.4	19.0	24.3	26.8	30.2	22.6	35.4	47.5	46.1
	MALE	14.9	8.7	8.8	12.6	10.6	6.8	18.7	23.7	30.8	21.2
	FEMALE	14.3	5.7	10.2	11.7	16.2	23.4	3.9	11.7	16.7	24.8
BLACK		14.0	6.4	6.8	11.5	14.0	17.1	9.9	17.3	19.5	24.2
	MALE	6.4	3.5	2.4	4.9	5.1	3.3	7.9	11.3	12.4	9.8
	FEMALE	7.6	3.0	4.4	6.6	8.9	13.8	1.9	6.0	7.0	14.4
HISPANIC		10.3	4.5	3.8	6.5	9.2	9.0	9.7	13.5	23.9	17.4
	MALE	6.0	2.9	1.9	4.0	3.9	2.3	8.4	9.7	16.0	9.4
	FEMALE	4.4	1.6	1.9	2.5	5.2	6.7	1.3	3.8	7.9	8.0
ASIAN/PACIFIC ISLANDER		4.3	3.1	8.1	5.7	3.1	3.6	2.3	3.9	3.3	3.8
	MALE	2.2	2.0	4.3	3.4	1.3	1.1	1.8	2.2	1.8	1.8
	FEMALE	2.0	1.1	3.7	2.3	1.7	2.5	0.6	1.6	1.5	2.0
AMIND/ALASKAN NATIVE		0.6	0.4	0.4	0.6	0.6	0.6	0.7	0.7	0.7	0.7
	MALE	0.3	0.2	0.2	0.3	0.2	0.1	0.6	0.5	0.5	0.3
	FEMALE	0.3	0.1	0.2	0.3	0.4	0.4	0.1	0.2	0.3	0.4

OCCUPATIONAL DISTRIBUTION

ALL EMPLOYEES	100.0	10.7	15.9	6.1	12.2	14.3	7.9	13.7	7.8	11.3
MALE	100.0	13.4	14.7	6.3	10.0	5.3	13.1	18.4	9.6	9.2
FEMALE	100.0	7.7	17.3	5.8	14.6	24.3	2.2	8.5	5.9	13.8
WHITE	100.0	13.0	18.2	6.5	12.6	14.1	8.7	12.5	5.8	8.6
MALE	100.0	16.2	16.8	6.8	10.6	4.9	14.3	17.0	7.0	6.4
FEMALE	100.0	9.2	19.9	6.1	14.9	24.7	2.2	7.3	4.4	11.2
MINORITY	100.0	5.3	10.4	5.1	11.2	14.7	6.1	16.6	12.7	17.9
MALE	100.0	6.2	9.4	5.1	8.7	6.5	10.0	21.8	16.2	16.2
FEMALE	100.0	4.3	11.4	5.0	13.8	23.3	2.2	11.2	9.1	19.7
BLACK	100.0	4.9	7.7	5.0	12.1	17.3	5.6	16.9	10.9	19.6
MALE	100.0	5.8	5.9	4.6	9.6	7.3	9.8	24.2	15.2	17.3
FEMALE	100.0	4.2	9.2	5.3	14.2	25.7	2.0	10.8	7.2	21.4
HISPANIC	100.0	4.6	5.8	3.8	10.8	12.4	7.4	17.9	18.1	19.1
MALE	100.0	5.2	5.0	4.1	8.0	5.5	11.2	22.2	21.0	17.8
FEMALE	100.0	3.8	6.9	3.5	14.6	21.9	2.3	11.9	14.1	20.8
ASIAN/PACIFIC ISLANDER	100.0	7.9	30.2	8.1	8.7	12.0	4.4	12.4	6.1	10.1
MALE	100.0	9.8	31.1	9.4	7.3	6.8	6.4	13.6	6.5	9.1

AMIND/ALASKAN NATIVE	FEMALE	100.0	5.8	29.1	6.8	10.3	17.7	2.2	11.1	5.7	11.3
		100.0	7.1	10.4	6.2	13.7	13.6	9.5	16.3	10.1	13.2
	MALE	100.0	8.7	9.7	6.6	9.9	5.8	15.6	20.6	12.4	10.7
	FEMALE	100.0	5.3	11.1	5.8	17.8	22.2	2.6	11.6	7.5	16.0

1/ EXCLUDES HAWAII

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§ 73.2080

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ee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any: (i) Bona fide newscast; (ii) bona fide news interview; (iii) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or (iv) on-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a broadcasting station. (Section 315(a) of the Communications Act.)

(2) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(h) *Political broadcasting primer.* A detailed study of these rules regarding broadcasts by candidates for Federal and non-Federal public office is available in the FCC public notice of July 20, 1978, "The Law of Political Broadcasting and Cablecasting." Copies may be obtained from the FCC upon request.

(Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303))

[43 FR 32795, July 28, 1978, as amended at 43 FR 45856, Oct. 4, 1978; 43 FR 55769, Nov. 29, 1978; 45 FR 26066, Apr. 17, 1980; 45 FR 28141, Apr. 28, 1980]

§ 73.2080 Equal employment opportunities.

(a) *General EEO policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations (as defined in this

part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex.

(b) *EEO program.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) *EEO program requirements.* A broadcast station's equal employment opportunity program should reasonably address itself to the specific areas set forth below, to the extent possible, and to the extent that they are appropriate in terms of the station's size, location, etc.:

(1) Disseminate its equal opportunity program to job applicants and employees. For example, this requirement may be met by:

(i) Posting notices in the station's office and other places of employment, informing employees, and applicants for employment, of their equal employment opportunity rights. Where it is appropriate, such equal employment opportunity notices should be posted in languages other than English;

(ii) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, or sex is prohibited;

(iii) Seeking the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and the inclusion of non-discrimination provisions in union contracts;

(iv) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one sex over another and that can be reasonably expected to reach minorities and women.

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation. For example, this requirement may be met by:

(i) Placing employment advertisements in media that have significant circulation among minorities residing and/or working in the recruiting area;

(ii) Recruiting through schools and colleges, including those located in the station's local area, with significant minority-group enrollments;

(iii) Contacting, both orally and in writing, minority and human relations organizations, leaders, and spokesmen and spokeswomen to encourage referral of qualified minority or female applicants;

(iv) Encouraging current employees to refer minority or female applicants;

(v) Making known to recruitment sources in the employer's immediate area that qualified minority members and females are being sought for consideration whenever you hire and that all candidates will be considered on a nondiscriminatory basis.

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its re-

cruitment area. For example, this requirement may be met by:

(i) Comparing the composition of the relevant labor area with composition of the station's workforce;

(ii) Where there is underrepresentation of either minorities and/or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary. Data on representation of minorities and women in the available labor force are generally available on a metropolitan statistical area (MSA) or county basis.

(4) Undertake to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(i) Instructing those who make decisions on placement and promotion that qualified minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed;

(ii) Giving qualified minority and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions.

(5) Analyze its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(i) Avoiding use of selection techniques or tests that have the effect of discriminating against qualified minority groups or females;

(ii) Reviewing seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race or sex discrimination.

[52 FR 26684, July 16, 1987]